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Special Advisory to Broadcasters
September 2006

Communications Advisory

Second Circuit Court of Appeals Remands Portion of March 2006 Indecency Decisions and FCC Seeks Comments

FCC's Office of Engineering and Technology Announces Schedule for Proceeding on Unlicensed Operation in the TV Broadcast Bands

*As we reported earlier, on March 6, 2006, the FCC released an Order in **Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005**, Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 (the "Omnibus Order"). After the release of the Order, Fox Television Stations, Inc. and CBS Broadcasting, Inc. filed a joint petition for review in the United States Court of Appeals for the Second Circuit and the ABC Television Network and Hearst-Argyle Television, Inc. filed a joint petition for review in the United States Court of Appeals for the D.C. Circuit which transferred the petition to the Second Circuit. The Second Circuit consolidated the petitions on June 14, 2006.*

Several parties to the case argued that they had not been provided with an opportunity to be heard by the FCC before the decisions in Section III. B of the Order were adopted. Those decisions involved four broadcasts (1) "The 2002 Billboard Music Awards" broadcast by Fox on December 9, 2002 in which Cher used the F-word; (2) "The 2003 Billboard Music Awards" broadcast by Fox on December 10, 2003, in which Nicole Richie used the F-word and the S-word; (3) various episodes of "NYPD Blue" aired by ABC between January 14 and May 6, 2003 in which the word "bullshit" was used; and (4) "The Early Show" broadcast on CBS affiliate KDKA-TV, Pittsburgh, PA on December 13, 2004 in which the word "bullshitter" was used. The broadcasts occurred between the hours of 6 a.m. to 10 p.m. In each case, the FCC found the language to be "presumptively profane" and indecent although it did not propose a forfeiture because its precedent at the time of the broadcasts indicated that the Commission would not take enforcement action against isolated use of expletives.

The FCC requested that the Second Circuit remand the portion of the case that dealt with these four decisions and the court held an oral argument on the request for remand on September 7, 2006. Following the oral argument, the court issued a stay of the enforcement of this portion of the Commission's indecency policy and granted the FCC's motion for a remand to give any interested parties an opportunity to comment on the broadcasts discussed in Section III.B of the Omnibus Order. The case has been remanded for a period of sixty days "for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances."

On September 7, 2006, the FCC released a Public Notice announcing a two-week period in which parties may submit comments concerning the four indecency decisions. The deadline for comments is September 21, 2006.

Those wishing to file comments in connection with this proceeding should contact an attorney in the communications section.

FCC's Office of Engineering and Technology Announces Schedule for Proceeding on Unlicensed Operation in the TV Broadcast Bands

On September 11, 2006, the FCC released a Public Notice announcing a projected schedule for handling its rulemaking proceeding which proposes to allow the operation of unlicensed devices on TV channels that are unused at any given location. The objective of the Public Notice is to establish a schedule for resolving outstanding issues so that unlicensed devices that are designed to operate on unused TV channels can be placed on the market at the completion of the DTV transition.

The Notice admits that the Commission presently does not have sufficient information in the record to adopt final technical rules governing the operation of unlicensed devices. Therefore, OET is in the process of developing a First Report and Order and Further Notice of Proposed Rulemaking that will make some initial decisions and present technical proposals necessary to adopt final rules. This document will take account of the comments that were filed in response to the May 2004 Notice of Proposed Rule Making concerning unlicensed devices. The Notice also encourages parties to conduct tests and submit them into the rulemaking record. At the same time, the FCC Laboratory plans to conduct its own testing program. The proposed schedule announced by the FCC is as follows:

Projected Date	Milestone
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October 2006	Commission adopts a First Report and Order and Further Notice of Proposed Rule Making
March 2007	FCC Laboratory reports the results of measurements of the interference rejection capabilities of DTV receivers
July 2007	FCC Laboratory reports the results of tests evaluating potential interference from unlicensed devices to TV and other radio services
October 2007	Commission adopts a Second Report and Order specifying final technical requirements for unlicensed devices that operate in the TV bands

Projected Date Milestone

December 2007	FCC Laboratory begins accepting applications for certification of unlicensed devices operating in the TV bands; certification will be granted at such time as the application has been reviewed and found to comply with the rules; certification will permit manufacture and shipment of products to distribution points
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February 2009	Products will be available for sale at retail
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